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Date: May 11, 2021

Item Number: \_\_\_\_\_

Resolution Number: \_\_\_\_\_

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☐ Unanimous Vote Required

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**Resolution of the Board of Directors of the Sonoma County Agricultural Preservation and Open Space District, State of California, Approving a Consent and Subordination Agreement Regarding the County of Sonoma's Acquisition of an Easement Necessary for the Pine Flat Road Repair Project (A.P.N. 141-100-005).**

Whereas, the Sonoma County Agricultural Preservation and Open Space District ("District") owns a certain Conservation Easement ("Conservation Easement") over certain real property identified as Assessor's Parcel Number A.P.N. 141-100-005, which is located along the southeasterly side of Pine Flat Road around Post Mile 17.81; and

Whereas, the segment of Pine Flat Road at the subject location was severely damaged by a landslide during a flooding event in 2017; and

Whereas, the subject portion of Pine Flat Road is a critical roadway for accessing the Geysers and other remote, fire-prone areas of the northeastern corner of the county, providing one of few reliable roadways for emergency vehicle access, evacuation routing, and ingress and egress for many residents along and beyond Pine Flat Road; and

Whereas, the County of Sonoma ("County") proposes to repair the damaged roadway and landslide area ("Project"), and funding for such has been approved by the Federal Emergency Management Agency ("FEMA"); and

Whereas, the Project will entail repairing the roadway, stabilizing the underlying and adjoining slope, installing permanent drainage and stormwater runoff improvements, and implementing other engineering and design features to best ensure the long-term functionality, reliability, and useful life of the roadway; and

Whereas, the Project is made necessary by the failed roadway and the existing risks of further slide and collapse of the subject roadway and adjacent surfaces; and

Whereas, in connection with the Project, the County requires certain permanent easement rights in a 20,412 square feet (0.468 acres) area of real property ("Slope Easement"). The Slope Easement area is on property owned in fee by Audubon Canyon Ranch, Inc., ("ACR"), which property is encumbered by the Conservation Easement; and

Whereas, the County has the power of eminent domain and could acquire the Slope Easement by exercising that power; and

Whereas, the County's offer to purchase the Slope Easement from ACR was made pursuant to Government Code section 7267.2, which preserves the County's right to pursue the acquisition in a condemnation action; and

Whereas, the Slope Easement contains the terms and conditions of the County's Project that will run with the land, including mitigation measures designed to preserve, to the fullest extent possible, the conservation purposes of the Conservation Easement. Notwithstanding, the County's Slope Easement is not absolutely consistent with the Conservation Easement which, but for the District's consent and subordination to the Slope Easement, would continue to govern the allowed uses and improvements on the portion of the Property affected by the Slope Easement; and

Whereas, the County and ACR acknowledge the need for the District's consent in order to complete the Slope Easement transaction as contemplated; and

Whereas, time is of the essence for the County to obtain possession of all required property rights in order to move forward with the Project; and

Whereas, in lieu of an immediate condemnation proceeding, the County has offered the District \$5,000 as compensation for (1) the reasonable value of the rights granted to the County via the District's subordination of its Conservation Easement to the Slope Easement and (2) a portion of the District's administrative and legal expenses incurred in connection with these matters; and

Whereas, pursuant to this Board's Resolution No. 92-1805, the open space interests protected by the Conservation Easement are dedicated under Public Resources Code section 5540; and

Whereas, the County's intended use of the subject property for roadway, slope, and drainage purposes is not consistent with the Conservation Easement; and

Whereas, Section 5542.5(a) of the Public Resources Code and Section 1240.660 of the Code of Civil Procedure both establish a rebuttable presumption that, where property has been appropriated by a local open space district for open space use, open space use is the "best and most necessary public use" as opposed to the use intended by a local condemning agency; and

Whereas, but for the credible and imminent threat of condemnation, the District would not yield the subject portion of the Conservation Easement to the requested Slope Easement; and

Whereas, in light of this unequivocal threat of condemnation, the law of eminent domain governs the District's approval of the transfer of possession to the County, not the limitations on conveyances of lands dedicated for open space set forth in Public Resources Code section 5540 *et seq.*; and

Whereas, this Board further concludes that the evidentiary presumption established by Code of Civil Procedure section 1240.660 is most likely rebuttable by virtue of the facts and

circumstances of this case, including the following:

- (i) The Project is being performed in order to secure a vital travel corridor in the region. Such corridor is necessary for public ingress and egress and for emergency services use. Given the wildfires that have ravaged the region in recent years, including in the Geysers area, and the prospect of future fires and other local emergencies, this is a vital access point for emergency services. Improvement of this important roadway cannot be implemented successfully without correcting slope conditions and repair of the underlying slide that has not only impacted the roadway section, but also the open space area below as well. Without the use of the subject property to secure and maintain the roadway, the repair cannot function as intended and needed, thereby compromising public safety.
- (ii) The County has minimized impacts to natural resources protected by the District's Conservation Easement by designing the Project to disturb the smallest area possible (comprising less than half an acre) and to minimize the scenic impacts by, for example, undergrounding the road support and drainage infrastructure to the maximum extent feasible. Prior to site work on the project commencing, the County will also develop and implement a mitigation plan that will be presented for approval by ACR and District staff designed to prevent non-native vegetation from being introduced to disturbed areas and replanting of native grasses in those areas.
- (iii) The Project and Slope Easement will also benefit the resources protected by the Conservation Easement by protecting those resources from the impacts of additional landslides that could result if the roadway is not repaired and maintained as contemplated by the Slope Easement. By stopping ongoing surface erosion of earthen material associated with existing conditions of the roadway, the Project will also protect water quality on the lands protected by the District's Conservation Easement.
- (iv) The Project provides numerous benefits to the public, including: (1) safe and reliable vehicular transportation on the County road system; (2) secured access for emergency vehicles (3) improved visual aesthetics resulting from the repair of the slide, and undergrounding of the majority of drainage systems and (4) protection of the environment and water resources that are made vulnerable by the existing conditions of the roadway.
- (v) Implementation of the Project is required for the public health, safety and general welfare. Without the proposed improvements, the roadway corridor will continue to degrade, and the Conservation Easement area would be at risk for future slides and erosion from the existing roadway. This impaired function will degrade safety for all users of this public road way. Public safety will be further eroded by the lack of access for emergency vehicles.

Whereas, the foregoing facts would together establish that use of the Conservation Easement area for the Project and Slope Easement is a more necessary public use than its existing open space uses and therefore the District would be unlikely to prevail in litigation challenging the County's right to acquire the Slope Easement by eminent domain; and

Whereas, this Board finds that, notwithstanding the fact that the County intends to use the property protected by the District's Conservation Easement for purposes inconsistent therewith, the proposed Consent and Subordination Agreement is in the public interest because it seeks to avoid the needless public expense that would otherwise be incurred in an eminent domain proceeding brought by the County against the District.

**Now, Therefore, Be It Resolved:**

1. The foregoing recitals are true and correct;
2. The conveyance of the Slope Easement allowed by the proposed Consent and Subordination Agreement is not voluntary, as it is in lieu of certain condemnation by the County;
3. This action is exempt from the California Environmental Quality Act (California Public Resources Code § 21000 *et seq*);
4. This Board approves of the Consent and Subordination Agreement on file with the Clerk, which will allow the County to obtain the Slope Easement rights needed to carry out the Project.
5. The Chair of the Board is hereby authorized and directed to execute said Consent and Subordination Agreement.
6. The General Manager is authorized and directed to record the Consent and Subordination Agreement in coordination with County staff following confirmation that the District has received the \$5000 payment described herein.

**Directors:**

Gorin:                      Rabbitt:                      Coursey:                      Gore:                      Hopkins:

Ayes:                      Noes:                      Absent:                      Abstain:

**So Ordered.**